

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

DONNIE L. FISHER,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

DOCKET NUMBER WD73269

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: December 27, 2011

APPEAL FROM

The Circuit Court of Randolph County, Missouri
The Honorable Michael L. Midyett, Judge

JUDGES

Division Two: Pfeiffer, P.J., and Howard and Martin, JJ.

CONCURRING.

ATTORNEYS

Mark A. Grothoff, Assistant State Public Defender
Columbia, MO

Attorney for Respondent,

Chris Koster, Attorney General
Jamie Pamela Rasmussen, Assistant Attorney General
Jefferson City, MO

Attorneys for Appellant.



MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

DONNIE L. FISHER,)
)
Respondent,)
v.) **OPINION FILED:**
) **December 27, 2011**
STATE OF MISSOURI,)
)
Appellant.)

WD73269

Randolph County

Before Division Two Judges: Mark D. Pfeiffer, Presiding Judge, and
Victor C. Howard and Cynthia L. Martin, Judges

Donnie L. Fisher was an escaped prison convict, who was considered armed and dangerous. Law enforcement officers were informed of Fisher's and another prison escapee's location in a mobile home and attempted to gain access by deploying non-lethal tear gas in an effort to flush the escapees out for apprehension and, when that was unsuccessful, by attempting to gain entry by prying open the rear door. When Fisher heard the noise at the rear door, he started firing; a shootout between the police and the escapees ensued. Fisher was charged and found guilty of five counts of assault of a law enforcement officer in the first degree and five counts of armed criminal action. His convictions were affirmed on appeal.

Fisher filed a Rule 29.15 motion for post-conviction relief, which the motion court granted. The motion court found that Fisher's appellate counsel provided ineffective assistance by failing to raise as error, on direct appeal, the trial court's refusal to instruct the jury on self-defense and on lesser-included offenses for the charges of first-degree assault of a law enforcement officer. The motion court vacated Fisher's convictions on first-degree assault of a law enforcement officer and armed criminal action and placed the case on the trial setting docket. The State appeals.

REVERSED AND VACATED; CONVICTIONS REINSTATED.

Division Two holds:

1. The trial court did not err in refusing to submit a self-defense instruction and, consequently, Fisher's appellate counsel was not ineffective for failing to raise a non-meritorious claim in Fisher's direct appeal. The right to self-defense limits the justifiable use of deadly force upon another person to situations where the actor *reasonably* believes that such force is necessary to protect himself or another against, among other things, death or serious physical injury initiated by *unlawful* force. When an escapee openly defies law enforcement officers, he is not allowed to take advantage of his own wrong and set up the excuse of self-defense. At all times after his escape, Fisher could have avoided *any* danger by peacefully surrendering himself to law enforcement authorities.

2. Assault of a law enforcement officer in the second degree is a lesser-included offense of assault of a law enforcement officer in the first degree; the distinguishing element between the two crimes is that first-degree assault requires that the defendant intended to cause death or serious physical injury to a law enforcement officer, while second-degree assault requires that the defendant intended to cause physical injury to a law enforcement officer.

A trial court is not required to instruct on a lesser-included offense unless the jury has a basis to (1) acquit of the offense charged, and (2) convict of the lesser offense. There was no error in the trial court's refusal to instruct on the lesser-included offense of assault of a law enforcement officer in the second degree because the facts did not support an inference that Fisher only intended to cause physical injury; rather, the facts established that he intended to kill or cause serious physical injury. Even though all the officers involved in the shootout survived, at least two officers were seriously and permanently injured. This constituted ample evidence for the jury to find that Fisher intended to cause the officers "serious physical injury."

Furthermore, the jury was instructed as to the lesser-included offense of assault in the first degree and found Fisher guilty of the greater offense. The failure to give a different lesser-included offense instruction is neither erroneous nor prejudicial when instructions for the greater offense and *one* lesser-included offense are given and the defendant is found guilty of the greater offense.

Opinion by: Mark D. Pfeiffer, Presiding Judge

December 27, 2011

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